

STATEMENT OF THE CASE.

Respondent is obliged to make the following additional statement of facts to correct inaccuracies and omissions in the statement of petitioners.

This is a review of the judgment of the Seventh Circuit Court of Appeals affirming an order of the District Court granting a temporary injunction to respondent.

Respondent is a railroad corporation engaged in interstate commerce. The injunction restrained petitioners from committing acts of violence and threats of violence, against the property and employees of respondent, and from the destruction of its property, all of which was being used in the transportation of interstate commerce.

The complaint avers that respondent is an interstate common carrier engaged in operating a railroad between Effner, Indiana and Keokuk, Iowa through the State of Illinois, with a branch extending from LaHarpe to Lomax, Illinois where it connects with the Santa Fe Railway, and another branch line extending from Hamilton to Warsaw, Illinois (R. 2).

The District Court after hearing witnesses granted a temporary restraining order, without notice, on January 3, 1942 at 3:50 o'clock p.m. (R. 50-60). At the same time the court filed findings of fact in support of the restraining order (R. 43, 49). The restraining order was made returnable January 8, 1942 at 10:00 o'clock a.m., at which time the application for a temporary injunction was set for hearing (R. 50, 60).

On January 8, 1942 at 10:00 o'clock a.m. respondent proceeded with the trial of its application for a temporary injunction (R. 68). The trial continued without interruption except for the usual adjournments and recess per-

FILE COPY

Office - Supreme Court, U. S.

FILED

OCT 4 1943

CHARLES ELMORE CROPLEY
CLERK

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1943

No. 28

THE BROTHERHOOD OF RAILROAD TRAINMEN,
ENTERPRISE LODGE NO. 27, ET AL.,

Petitioners,

vs.

TOLEDO, PEORIA & WESTERN RAILROAD,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT
OF APPEALS FOR THE SEVENTH CIRCUIT.

Brief of Respondent.

✓
JOHN M. ELLIOTT,
1401 Alliance Life Building,
Peoria, Illinois,

✓
CLARENCE W. HEYL,
809 Central National Bank Building,
Peoria, Illinois,
Attorneys for Respondent.

ods) until January 19, 1942 when it was concluded and the order signed granting the temporary injunction (R. 977). Finding of fact and conclusions of law were also filed (R. 970-977).

At 3:15 o'clock p.m. on January 8, 1942 and within the five days from the time the temporary restraining order was entered, the District Court entered an order extending and continuing in force the temporary restraining order until January 17, 1942 at 3:15 o'clock p.m., and set forth in the order the reason therefor (R. 66, 67). This order *was entered with notice to the petitioners*, as they and their counsel were present in the District Court participating in the trial (R. 68, 71).

The trial then continued without interruption until January 16, 1942 at 5:00 o'clock p.m., when it was determined by the Court that the trial of the case could not be concluded by January 17, 1942 at 3:15 o'clock p.m., and the Court entered an order extending and continuing in force the temporary restraining order to January 19, 1942 at 5:00 o'clock p.m. The order recites the necessity for such extension (R. 965, 966). This order was entered with full notice to petitioners and their counsel who were present in Court, and the order recites their objections thereto (R. 965, 966).

Petitioners state that the temporary restraining order of January 3, 1942 was issued without notice. They fail, however, to state that both extensions were with notice during the progress of the trial.

Petitioners do not question here the action of the trial court in granting the temporary restraining order. (See specification of errors Pet. Brief p. 6.)

Respondent contends that the first and second orders extending the temporary restraining order were valid because the statute only limits the validity of a temporary

restraining order to five days *where such order is granted without notice.* (Title 29 U.S.C.A. Sec. 107.) The orders complained of were entered *with notice to petitioners and their counsel*, all of whom were in Court participating in the trial. Before the expiration of the second order extending the temporary restraining order the Court concluded the trial and entered the order for a temporary injunction on January 19, 1942 (R. 977, 982), and filed findings of fact and conclusions of law (R. 970-977).

When the court signed the order for temporary injunction the temporary restraining order merged into the temporary injunction.

The complainant avers that respondent as a common carrier of freight by railroad, engaged in interstate commerce, is subject to the provisions of the Act of Congress known as "An Act to regulate Commerce," and Acts amendatory and supplementary thereto, and the Transportation Act of 1920, as amended (R. 4); that it is also subject to the Railway Labor Act, as amended, and that as such common carrier it is subject to and included within the words "war utilities," as defined by the Federal Statute, as amended, Sections 101, 103, 104 and 105, Title 50 of the U. S. Code of the Act of Congress of April 20, 1918, as amended November 30, 1940, Chapter 926, 54 Statute, 1220 (R. 4); that it is engaged in the transportation of freight included within the definition of "war utilities"; that by reason of the unlawful and unauthorized acts of violence of said petitioners, it had been prevented and is now being prevented from the transportation of such articles in interstate commerce (R. 12).

It is necessary that additional facts be stated by respondent showing the circumstances leading to the strike.

In October and November of 1940 elections by the train service employees of respondent were held under the pre-

INDEX

| | PAGE |
|--|--------------|
| Brief of Respondent..... | 1-60 |
| Opinions of the Lower Courts..... | 1 |
| Jurisdiction of this Court..... | 1 |
| Statement of the Case..... | 2-9 |
| Summary of Argument..... | 9-13 |
| Statement of Points in Respondent's Argument..... | 14-17 |
| Argument | 18-60 |
| I. Petitioners' contention that the District Court improperly extended the temporary restraining order, keeping it in force for more than five days, is moot. Temporary restraining order, as extended, expired when the temporary injunction was issued, and prior to the notice of appeal..... | 14, 18-21 |
| II. The District Court properly extended the temporary restraining order after notice during the hearing of the application for temporary injunction, and the temporary restraining order was merged in the temporary injunction | 14, 22-23 |
| III. The complaint shows upon its face that the injunction prayed for was to restrain petitioners from committing acts of violence and threats of violence, and thereby interfering with and preventing the transportation of interstate commerce and the discharge of the obligations of respondent as an interstate carrier to furnish interstate transportation. The District Court had jurisdiction of the subject matter because all of the issues involved federal questions | 14-15, 23-36 |

visions of the Railway Labor Act, supervised by John F. Murray, Mediator for the National Mediation Board, which resulted in the selection of the Brotherhoods as their representatives (R. 770-774). At all times subsequent thereto respondent recognized the Brotherhoods and negotiated with their representatives and with no other persons (R. 775).

There is no claim made here that respondent did not at all times after said elections mediate in good faith with the representatives of the men chosen at the elections.

On December 17, 1940 and again on January 7, 1941 respondent delivered to the representatives of the two Brotherhoods, respectively, its proposed schedules of rules, working conditions and rates of pay (R. 780-781). On January 8, 1941 the proposed schedules were discussed by respondent with the designated representatives of the men who informed respondent that they could not accept anything in such proposals, and that they found it necessary to invoke the service of the National Mediation Board (R. 781).

On January 15, 1941 notice was received by respondent from the National Mediation Board that it had taken charge of mediation (R. 779). Mediator Murray, representing the Board, arrived in Peoria on March 17, 1941, and took charge of the mediation of the dispute from that date until November 7, 1941. Numerous conferences were held by the representatives of the men and the respondent presided over by Mediator Murray (R. 776). Exhibit 24 is a memorandum showing the dates and duration of each of the conferences (R. 776-779).

On November 3, 1941 respondent submitted and delivered to the representatives of the Brotherhoods and to Mediator Murray its revised amended proposals of rates of pay, rules and working conditions (R. 782). Media-

tion continued until November 6, 1941 when respondent was informed by the representatives of the Brotherhoods that they could not agree to the proposals. The Brotherhoods were then requested by respondent to suggest a rate of pay for which they would be willing to agree to the rules and working conditions submitted on November 3, 1941 (R: 782).

On the following day respondent was informed by the Brotherhoods that they could not name a rate of pay for which they would accept the proposed rules and working conditions. Thereupon Mediator Murray handed both parties arbitration proposals which proposals were declined by both the Brotherhoods and respondent (R. 782).

On November 17, 1941 respondent requested the National Mediation Board that some impartial fact finding committee be appointed to consider the matters involved in the dispute (R. 785, 786).

On November 21, 1941 after both parties to the dispute had refused to arbitrate, the National Mediation Board terminated its mediation efforts in the manner prescribed by the Statute, advising both in writing that its efforts to settle the controversy by mediation were unsuccessful, and that mediation was terminated as of that date (R. 782) (See Exhibits 27 and 28 attached to the complaint as Exhibits A and B) (R. 34-37).

From the date of the termination of the mediation as above, until the strike occurred December 29, 1941, respondent continued to urge the National Mediation Board to request the President to appoint an emergency board as provided by the Railway Labor Act. All of these requests were ignored (R. 785, 786).

Thirty days after the termination of mediation respondent had the absolute right under the statute, without any further notice to the employees, to put into effect its

Argument (continued):

- IV. The undisputed evidence offered by respondent shows that the public officers charged with maintaining order were unable or unwilling to furnish adequate protection for respondent's employees and its property against the violence and threats of violence of the petitioners 15-16, 36-47
- V. The undisputed evidence offered by respondent shows it complied with all the obligations imposed upon it by the Railway Labor Act and Section 108 of the Norris-LaGuardia Act. The findings of the District Court on this point, approved by the Circuit Court of Appeals, are supported by substantial evidence..... 16, 17, 48-60

| | |
|---------------------------|-----------|
| Conclusion | 60 |
| Appendix, Exhibit 21..... | 8, 10, 61 |

CASES CITED BY RESPONDENT.

| | |
|--|------------|
| Alabama Power Co. v. Ickes, 302 U.S. 464; 58 S. Ct. 300 | 37, 38 |
| A. T. & Santa Fe Ry. Co. v. Peterson, 43 Fed. 2d. 198 | 33 |
| Bunning v. Commonwealth (Ct. of Appeals, Ky.) 197 S.W. 542 | 20 |
| Cater Construction Co. v. Nischwitz (CCA 7th Cir.), 111 Fed. 2d. 971..... | 46, 59 |
| City of Reno v. Sierra Pacific Power Co. (CCA 9th Cir.) 44 Fed. 2d. 281..... | 23 |
| Edd v. Home Owners Loan Corp., (S. Ct. of S. Dak.), 291 N.W. 573..... | 19 |
| Ex Parte Lennon, 166 U.S. 548; 17 S. Ct. 658..... | 29, 30, 32 |
| Ex Parte Steele, D.C. 1908, 162 F. 694..... | 20 |

CASES CITED BY RESPONDENT (continued).

| | |
|--|--------------------|
| Fair, The, v. Kohler Die & Specialty Co., 228 U.S. 22; 33 S. Ct. 410..... | 33 |
| Lake Valley Farm Products v. Milk Wagon Drivers Union Local 753, 108 Fed. (2d) 436..... | 45 |
| Lennon, Ex Parte, 166 U.S. 548; 17 S. Ct. 658..... | 29, 30, 32 |
| Louisville & Nashville Rr. Co. v. Rice, 247 U.S. 201; 38 S. Ct. 429..... | 25 |
| McNeil, et al. v. Hubert, 119 Texas 18, 23 S.W. (2d) 331, 333 | 20 |
| Macon Grocery Co. v. Atlantic C. L. R. Co., 215 U.S. 501; 30 S. Ct. 184..... | 32 |
| Mayo v. Dean, 82 Fed. 2d. 554-556..... | 59 |
| Motor Securities Corp. v. Jones, (Civil Court of Appeals of Texas) 90 S.W. 2d. 858..... | 20 |
| Mulford v. Smith, 307 U.S. 38; 59 S. Ct. 648..... | 32 |
| Newton v. Laclede Steel Co. (CCA 7th Cir.) 80 Fed. 2d. 636 | 45, 59 |
| Peyton v. Railway Express Agency, 316 U.S. 350; 62 S. Ct. 1171..... | 25 |
| Potter v. Yonts, 172 Ky. 130, 188 S.W. 1059..... | 20 |
| Railroad Commission v. Worthington, 225 U.S. 101; 32 S. Ct. 653..... | 34 |
| Rice v. United Electric Coal Companies, 297 U.S. 714; 56 S. Ct. 590..... | 46, 60 |
| Sharp v. Barnhart, 117 Fed. 2d. 604..... | 35, 36 |
| Southern Pacific Co. v. Peterson, Atty. Gen., Arizona, and A. T. & S. Fe Ry. Co. v. Peterson, etc., 43 Fed. 2d. 198..... | 33 |
| Texas & N. O. R. Co. v. Brotherhood of Railway & Steamship Clerks, 281 U.S. 548; 50 S. Ct. 427 | 26, 27, 37, 51, 58 |

amended schedules of rates of pay, rules and working conditions.

It did not put them into effect, however, until December 29, 1941, but advised the Brotherhoods on December 21, 1941 of the date they would go into effect (R. 11).

The letter of December 21, 1941 (R. 11) was not a notice of new rates of pay, rules and working conditions; it was simply advice to the Brotherhoods and the employees of the date that the schedules submitted November 3, 1941 would become effective.

Petitioners claim that one of the strikers, Dilley, was shot as he stood near the right of way by a special agent in the cab of a locomotive. There is no direct evidence in the record that Dilley was shot by a special agent. He was injured while in a crowd of the strikers who were attacking a train of respondent.

Petitioners in their statement of the case, page 3, claim that, "the only substantial damage to property was shattered glass in cabs, headlights, and switches."

These assertions are untrue. The undisputed evidence shows that employees of respondent were brutally assaulted by certain of petitioners, and on one occasion one of petitioners assaulted a fireman and left him lying near his engine in an unconscious condition (R. 293, 295). That petitioner did not deny the assault. Men were brutally assaulted by petitioners as they were working on the trains, or as they were coming to or leaving their work. On one occasion a train was stopped by certain of the petitioners, and the train crew driven by force and violence from their posts upon the engine (R. 282-292, 293-302, 326, 327, 330-332).

The actions of the mobs led by petitioners in stopping trains and assaulting the employees operating same is

shown by the evidence at the following pages of the record (R. 140-145, 175-184, 190-210, 241, 254, 218-232, 462-469, 443-459, 408-442, 488-494, 511-520).

The testimony showing other acts of violence may be found at the following pages of the record (R. 81-92, 105-117, 140-144, 166-167, 172, 180, 190-199, 202-207, 219-232, 234-240, 241-254, 281-292, 293-302, 326-327, 330-332, 356-360, 361-367, 408-420, 443-459, 463-467, 502-507, 511-520, 521-525, 537-547).

Petitioners also say in their brief that respondent did not cease operation of its road. This statement is incorrect because the record conclusively shows that the violence was so severe that there were no trains operated from Friday night January 2, 1942 until Sunday morning January 4, 1942 (R. 699-702, Exhibit 21). (See p. 61 of this brief.)

The District Court and the Circuit Court of Appeals both found that the violence was so extensive and severe as to prevent the operation of respondent's road (R. 956, 970-977, 1026).

Petitioners in their statement infer, but do not directly charge, that the facts in the record are insufficient to show that the public officers were unable or unwilling to furnish adequate protection to respondent for its employees and its property.

The inference is untrue. The evidence in the record shows that no effort whatsoever was made by any law enforcement officer to protect either the men assaulted or the property. The evidence also shows proper requests were made by respondent to the officers, and they replied that they could do nothing because of the lack of deputies, or because of the size of the mobs led by petitioners (R. 380-386, 408-460, 81, 92, 104-117, 723, 724, 725, 730, 732, 734, 757, 759, 991-999, also see R. 720-752).

These facts were not denied, and petitioners offered no proof to the contrary.

The petitioners filed no pleading before the trial, and did not file an answer to the complaint until February 16, 1942 (R. 991) almost one month after the order for temporary injunction was entered.

SUMMARY OF ARGUMENT.

Petitioners' summary (pp. 7-9) is inaccurate and inadequate, and is corrected by the following:

This is a review of the judgment of the Seventh Circuit Court of Appeals affirming a judgment for temporary injunction entered by the District Court restraining petitioners from interfering with respondent, an interstate common carrier, by violence or threats of violence in the transportation of interstate freight.

The order for the temporary injunction in no way interfered with the rights of the striking employees to pursue peaceful picketing, nor did it interfere with other rights as such employees, *but only restrained them from violent acts against the employees and the property of the respondent, the interstate carrier.* (Order for Injunction, R. 977-982; Findings of Fact, 970-977; oral decision of trial judge, 954-957.)

Respondent is an interstate common carrier operating a railroad from Keokuk, Iowa, to Effner, Indiana. Approximately one hundred conductors, brakemen, engineers and firemen went on a strike December 28, 1941, at 6 P. M., *and immediately acts of violence were committed in nine of the eleven counties in Illinois through which this railroad extends*, resulting in serious injury to many employees, destruction of property, interference with the movement of interstate trains, interference and stoppage of the movement of war materials, all of which resulted

in an absolute cessation and total abandonment of the operation of the railroad and the movement of interstate commerce and war materials from Friday night, January 2, 1942, to Sunday morning, January 4, 1942.

Attached to this brief as an appendix is a reproduction of Respondent's (Plaintiff's) Exhibit 21 admitted in evidence (R. 699, 702-709). (See page 61 of this brief.)

A glance at this exhibit will show that more than fifty acts of violence were committed by petitioners from the beginning of the strike December 28, 1941, until the granting of the restraining order January 3, 1942. The situs of the acts of violence are indicated on this exhibit by red dots. This exhibit also discloses the movement of all trains day and night during the period above referred to and the numerous points along said railroad where these acts of violence were committed.

The only defense made by petitioners in the trial of this case, on the merits, consisted of the testimony of various members of the Brotherhoods who denied their personal participation in various incidents where the respondent's witnesses had testified to acts of violence. There was no denial by the petitioners of the fact that these incidents actually occurred, but the defense was limited simply to testimony by certain individuals who attempted to deny their identification and participation in certain acts or incidents where violence was committed. The trial court as indicated by his ruling did not believe the testimony of the petitioners and their witnesses, and in practically every case held with respondent on the question of fact as to who actually participated in each incident where violence was shown.

In other words, the trial judge did not believe the testimony with reference to the alibi which was made in this case by petitioners, which was the kind that usually appears in criminal cases. Several members of the Brother-

hood who were identified in serious acts of violence, did not testify.

Not only did the trial court find practically all of the Brotherhood officers and members who were defendants to the injunction proceedings, guilty of violence (R. 957-958), but the Circuit Court of Appeals, in the last paragraph of the opinion, found that the participation in the acts of violence by the officers of the union, as well as many members, was established by clear proof of actual participation (R. 1031).

The statement in brief (page 3) that "plaintiff did not cease operation of its railroad but there were some temporary delays" is not a true statement of the facts. The District Judge found as a fact (R. 970-977) specific instances of violence committed by petitioners and interference with the movement of interstate commerce, not only upon respondent's railroad but also upon movement of interstate commerce over other connecting carriers, and that many cars of interstate freight consigned to respondent by connecting carriers were delayed and delivery prevented by reason of the acts and threats of violence toward employees not only of respondent but also of other railroads.

The Circuit Court of Appeals found (R. 1021-1031) that respondent's workers were assaulted, moving trains stoned, trains derailed, windows and lights on the locomotives and cabooses broken, trains stopped and many threats made against respondent's employees, and on one occasion the throwing of a bottle of inflammable liquid into the engine cab of a moving train, causing fire, and injury to the occupants.

The Circuit Court of Appeals also found (R. 1026) that the acts complained of were so violent that plaintiff was forced to abandon temporarily its train service; that the violence and threats of violence spread over the entire dis-

tance of the length of the railroad from Iowa through Illinois to Indiana (R. 1028).

Reference to the written Findings of Fact signed by the District Judge when the temporary injunction was issued (R. 970-977) will show that the court made a specific finding of fact on each of the allegations of violence as set forth in the complaint, and these findings of fact were affirmed by the decree of the Circuit Court of Appeals.

Petitioners state (page 31) that the evidence is insufficient to support the findings that the public officials charged with the enforcement of law were unable or unwilling to perform that duty.

Petitioners offered no testimony disputing the testimony of respondent on the question of the inability or unwillingness of the officers of the law to furnish adequate protection to the property and employees of the respondent, and there is no serious conflict in the testimony except in several minor incidents developed on cross-examination.

The testimony offered by respondent on this question was not denied by a single witness called on behalf of petitioners. The District Judge made specific findings of fact (R. 975) that the public officers charged with the duty of protecting respondent's property were unwilling or unable to furnish adequate protection.

The Circuit Court of Appeals affirmed that finding in its opinion (R. 1028), and summarizes the evidence, to which respondent refers for the statement of facts on that question. These findings of the lower courts were supported by substantial evidence.

The brief of petitioner does not accurately and adequately set forth the facts with reference to the efforts of respondent to settle a labor dispute with the petitioners.

In October, 1940, as a result of elections held with the consent of respondent, the Brotherhoods became the repre-

representatives of the train service employees of respondent. These elections were duly held under the Railway Labor Act and supervised by a mediator of the National Mediation Board.

At all times subsequent to the selection of the Brotherhoods as representatives of the train service employees, respondent recognized and negotiated with these representatives for the men, and with no other persons (R. 775).

The purpose of these negotiations was to negotiate a contract with the Brotherhoods representing train service employees. No contract with the Brotherhoods existed prior thereto for many years.

On November 21, 1941, after both parties to the dispute had refused to arbitrate, the Mediation Board terminated its mediation efforts in the manner prescribed by the statute. (Title 45, U.S.C.A., Sec. 155.) The mediator left Peoria, and mediation proceedings were terminated in the manner prescribed by statute. Following that date, respondent urged the Mediation Board, by exchange of telegrams, to recommend the appointment of an emergency board to be appointed by the President, as provided in the Railway Labor Act, but this was not done.

No further mediation was had, and the statement in brief (page 3) that "negotiations were resumed, but an agreement was not reached" is untrue, and is not in any way supported by any evidence in the record.

Petitioners offered no evidence upon the trial, oral or documentary, in any way contradicting the testimony of respondent's witnesses who had attended all conferences and negotiations between the parties from October, 1940, to November 7, 1941; this evidence shows a full compliance by respondent with regard to the mediation proceedings. *A clear statement of the facts on this question is made in the opinion of the Circuit Court of Appeals* (R. 1030-1031).

A further discussion on this point will follow in the argument.

STATEMENT OF POINTS IN RESPONDENT'S ARGUMENT.

I.

Petitioners' contention that the District Court improperly extended the temporary restraining order, keeping it in force for more than five days, is now moot.

The temporary restraining order, as extended, expired when the temporary injunction was issued and prior to the notice of appeal.

II.

The trial of the application for temporary injunction was begun before the expiration of the temporary restraining order, and the court had power to extend such order during the progress of the trial with notice to petitioners and their counsel who were there participating in the trial.

Section 7 (Sec. 107, Title 29, U.S.C.A.) of the Norris-LaGuardia Act relates only to temporary restraining orders entered *without notice*.

Both of the extensions were made after notice and a hearing, to preserve the *status quo* of the property during the hearing of the application for a temporary injunction.

The temporary restraining order was merged in the temporary injunction.

III.

Original jurisdiction in law and equity cases was vested in the District Court by Congress by Title 28, U.S.C.A., Sec. 41 (8), in all suits and proceedings arising under any law regulating commerce.

The complaint upon its face shows that the injunction prayed for was to restrain petitioners from committing acts of violence and threats of violence, thereby interfering with and preventing the transportation of interstate commerce, and the discharge of the obligations of respondent as an interstate carrier to furnish interstate transportation as required by the Interstate Commerce Act. Section I (4), (6), (11), (18), (19), (20), Title 49 U.S.C.A.

The District Court had original jurisdiction without regard to diversity of citizenship or the amount involved, because all the issues are federal questions relating to interstate commerce.

The District Court had jurisdiction under the Railway Labor Act (Title 45 U.S.C.A., Sec. 151-160) because it is therein provided that all interstate common carriers by railroad are included within the provisions of that Act.

The right asserted by respondent to be free from violent interference of its business as an interstate carrier is created by the Federal Constitution and statutes, and not by the state law, and the determination of the result of the case depends upon the construction and application of the Federal Constitution and statutes.

Congress in passing the Interstate Commerce Act in 1887, and by the amendments thereto, assumed exclusive jurisdiction in determining the duties and obligations of carriers of interstate freight.

IV.

The clear and conclusive evidence offered by respondent shows that the public officers charged with maintaining order were unable or unwilling to furnish adequate protection for respondent's employees and its property against the violence and threats of violence of petitioners.

The District Court made a specific finding of fact (R. 975), that the evidence proved the failure, inability or unwillingness of the public officers to furnish adequate protection to the property of respondent, and the movement of its trains, and the Circuit Court of Appeals has concurred in that finding (R. 1028-1029), and these findings, not shown to be plainly erroneous or unsupported by substantial evidence, are, under the well established rule, accepted by this Court as unassailable.

V.

The undisputed evidence offered by respondent shows that it complied with all the obligations imposed upon it by the Railway Labor Act, and by Section 8 (Sec. 108, Title 29 U.S.C.A.), Norris-LaGuardia Act.

The District Court made a specific finding of fact (R. 970) that the evidence of respondent proved that respondent by negotiation and mediation complied with the provisions of the Railway Labor Act, and all other laws relating to labor disputes, in an honest effort in good faith to reach an agreement with the Brotherhoods, and the Circuit Court of Appeals concurred in that finding (R. 1029-1031).

Neither the Railway Labor Act nor the Norris-LaGuardia Act required respondent to submit to compulsory arbitration to show a compliance entitling it to injunctive relief; respondent fully complied in good faith with all requirements of laws relating to labor disputes by negotiation, mediation and the request for the appointment of an emergency board.

Respondent made no change in its rates of pay, rules and working conditions until more than thirty days after the termination of the mediation proceedings by the National Mediation Board, and in that respect fully complied with Section 5 (Sec. 155, Title 45 U.S.C.A.), Railway Labor Act.

The District Court and the Circuit Court of Appeals concur in findings of fact that petitioners were guilty of violence and threats of violence in obstructing the transportation of interstate freight; and the provisions of Section 8 (Sec. 108, Title 29 U.S.C.A.), Norris-LaGuardia Act do not apply where acts of violence and threats of violence and destruction of property are committed by employees.

The findings of the District Court and the Circuit Court of Appeals that respondent was not required to arbitrate is in accordance with the first paragraph of Section 7 (Sec. 157, 45 U.S.C.A.), Railway Labor Act, which provides:

"Whenever a controversy shall arise between a carrier or carriers and its or their employees which is not settled either in conference between representatives of the parties or by the appropriate adjustment board or through mediation, in the manner provided in the preceding sections, such controversy may, by agreement of the parties to such controversy, be submitted to the arbitration of a board of three (or, if the parties to the controversy so stipulate, of six) persons: *Provided, however, That the failure or refusal of either party to submit a controversy to arbitration shall not be construed as a violation of any legal obligation imposed upon such party by the terms of this chapter or otherwise.*" (Italics ours.)

Such findings also complied with the provisions of Section 8 (Sec. 108, Title 29, U.S.C.A.), Norris-LaGuardia Act, which provides:

"No restraining order or injunctive relief shall be granted to any complainant who has failed to comply with any obligation imposed by law which is involved in the labor dispute in question, or who has failed to make every reasonable effort to settle such dispute either by negotiation or with the aid of *any available governmental machinery of mediation or voluntary arbitration.*" (Italics ours.)

ARGUMENT.

I.

Petitioners' contention that the District Court improperly extended the temporary restraining order, keeping it in force for more than five days, is moot.

Respondent submits that the action of the District Court in extending the temporary restraining order, after notice to petitioners and their counsel, beyond the original period of five days is not now an issue to be considered by this court because such question has become moot.

The temporary restraining order entered without notice was limited to a period of five days, expiring January 8, 1942 at 3:50 o'clock p.m. The hearing on the application for temporary injunction was in progress and the court at 2:15 o'clock p.m. on that date, having determined that the hearing could not be completed before the expiration of such order, after notice to petitioners and their counsel, entered an order extending the temporary restraining order until January 17, 1942 at 3:15 o'clock p.m. (R. 66-67) to preserve order and prevent violence until the hearing could be completed and a decision rendered on the application for temporary injunction. The hearing on the application for temporary injunction not having been completed on January 16, 1942, the District Judge entered a further order extending and continuing in force the temporary restraining order until five o'clock p.m. on January 19, 1942, which said order was entered after notice to petitioners and their counsel, the order reciting the reasons therefor (R. 965-966).

The temporary restraining order, as extended, expired January 19, 1942 at 5:00 o'clock p.m. In the meantime

the hearing on the application for temporary injunction had been completed and the District Court filed the findings of fact and conclusions of law, and entered the temporary injunction order (R. 970-982).

No motion was made to dissolve the temporary restraining order. The appeal was filed February 17, 1942, long after the expiration of the temporary restraining order and the orders continuing it in effect until January 19, 1942.

The temporary restraining order, as extended, having long since expired and, as we shall hereafter show, having merged into the temporary injunction, cannot now affect any rights of petitioners. No order can be entered now which could in any way benefit petitioners with respect to the temporary restraining order.

In the case of *United States v. Pan-American Commission* (D.C.S.D., N.Y., 1918) 261 F. 229, Mr. Circuit Judge Hough said, 231:

"That equity case is 'moot' in which no decree consistent with both pleadings and existing facts will benefit any party as against the other parties to the litigation."

In the case of *Thompson v. Texas Products Co.* (Ct. of Civil Appeals of Texas), 115 S.W. 2d. 1195, it appeared that a temporary restraining order was made returnable on February 28, 1938. An appeal was taken and the case submitted to the Court of Appeals on the 3rd day of March, 1938, and decided March 31, 1938. The court sustained a motion to dismiss the appeal on the ground that the issues involved had become moot.

In the case of *Edd v. Home Owners Loan Corporation* (S. Ct. of S. Dak.), 291 N.W. 573, the court said; 574:

"The order having expired by its own terms, the question presented on this appeal has become moot, and the appeal is dismissed without costs to either party."

In the case of *Motor Securities Corp. v. Jones* (Civil Court of Appeals of Texas), 90 S.W. 2d. 858, the court at page 859 quoted from the case of *McNeil et al. v. Hubert*, 119 Texas 18, 23 S.W. (2d) 331, 333, as follows:

"A case becomes moot when it appears that one seeks to obtain a judgment upon some pretended controversy when in reality none exists, or when it seeks judgment upon some matter which, when rendered, for any reason cannot have any practical legal effect upon a then existing controversy."

To the same effect see *Wallace v. McClendon* (S. Ct. of Okla.), 289 Pac. 354; *Thoening v. City of Adams*, 236 Wisc. 319, 294 N.W. 826, 827, citing *Ex parte Steele*, D.C. 1908, 162 F. 694.

In the case of *Bunning v. Commonwealth* (Ct. of Appeals, Ky.), 197 S.W. 542, the court said, page 543, quoting with approval from *Potter v. Yonts*, 172 Ky. 130, 188 S.W. 1059:

"It is not, however, within the province of appellate courts to decide abstract, hypothetical or moot questions, disconnected from granting of actual relief, or from the determination of which no practical relief can follow."

Respondent respectfully submits that no practical effect can be had by petitioners or others by the court considering the granting of the extension orders. The orders expired by their own terms.

Petitioners say that contempt proceedings may be based upon violation of such temporary restraining order. No such proceedings have been instituted and none will be. The only contempt proceedings instituted are based upon a violation of the temporary injunction (R. 985-986, 987-989).

Under point I of petitioner's brief (9-10) it is stated that contempt proceedings were instituted in the District Court, trials had and defendants found guilty, and that the District Court imposed sentences but ordered that they should not be executed until thirty days after final determination by this Court of this case. The record discloses that the orders or rule to show cause were based upon violation of the temporary injunction (R. 985-989).

There is nothing in the record with reference to the trial or sentence in any contempt case. The statement of counsel for petitioners that certain of their clients were convicted of contempt of court is clear evidence of the necessity of the granting of the temporary injunction restraining petitioners from threats of violence and acts of violence.

On pages 10, 11, 12 and 13 of petitioners' brief reference is made to the Executive Order of the President of March 21, 1942, being No. 9108, and an order of the District Court assessing fines against certain violators of the temporary injunction and the extension of time within which to pay such fine. None of these matters are shown in the record now before the Court. Respondent respectfully submits the argument of petitioners' counsel with reference to such matters should have no effect and should not be considered in the decision of the issues in this case.

Counsel for petitioners also (Br. 13-20) argue that the issues in this case are not moot because there is a possibility of liability upon the temporary injunction bond which may be affected by a decision upon the merits. Respondent respectfully submits that there is no issue in this appeal which requires a decision upon such question.

II.

The District Court properly extended the temporary restraining order after notice during the hearing of the application for temporary injunction, and the temporary restraining order was merged in the temporary injunction.

Section 7 (Sec. 107, Title 29 U.S.C.A.) of the Norris-LaGuardia Act relates only to orders entered without notice. Congress did not limit the District Court's jurisdiction to enter restraining orders in labor disputes in excess of five days where there was notice or a hearing.

Both orders extending and continuing in force the temporary restraining order were entered with notice to petitioners and their counsel, *who were present in court at the time of the entry of each order*. These orders specifically recite the reasons for entering the same (R. 66-67, 965-966), viz., to protect employees and property of respondent while the court was hearing the application for temporary injunction, and were made with full notice to petitioners and after a hearing, and objections thereto in open court (R. 66-68, 965-966).

The opinion of the Circuit Court of Appeals (R. 1022-1023) clearly shows the purpose and intent of Section 107, Title 29 U.S.C.A. and the necessity as a practical application of the law of extending and keeping in force the temporary restraining order until the completion of the hearing and decision on the application, for a temporary injunction. If the Court had not extended the effect of the temporary restraining order during the hearing there would have been a period of more than a week during which petitioners, if unrestrained, might have caused further irreparable damage.

The contempt proceedings were instituted for violation of the *temporary injunction* (R. 985-6, 987-8, 988-9).

In addition thereto the temporary restraining order was merged in the temporary injunction as specifically held in *City of Reno v. Sierra Pacific Power Co.*, 44 F. (2d) 281-283 (CCA 9th Circuit) and by the Circuit Court of Appeals in this case (R. 1023).

Petitioners (Br. 21) say that if the restraining order was void between January 8, 1942 and January 19, 1942, it will not sustain contempt proceedings that may be brought, and the issue is alive and should be determined by this Court. In reply to this statement, respondent says that no contempt proceedings have at any time been instituted by respondent for violation of the temporary restraining order or for violation of either of the extensions thereof, and none will be instituted.

III.

The complaint shows upon its face that the injunction prayed for was to restrain petitioners from committing acts of violence and threats of violence, and thereby interfering with and preventing the transportation of interstate commerce and the discharge of the obligations of respondent as an interstate carrier to furnish interstate transportation. The District Court had jurisdiction of the subject matter because all of the issues involved federal questions.

The complaint of respondent alleged facts showing that it was an interstate common carrier of freight by railroad subject to the provisions of an Act entitled, "An Act to Regulate Commerce," and acts amendatory and supplementary thereto, Title 49 U.S.C.A., and the Transportation Act of 1920, as amended, Title 49 U.S.C.A., and as a common carrier subject to the Railway Labor Act, Title 45

U.S.C.A., Sections 151-160, the War Utilities Act, Title 50 U.S.C.A., Sections 101, 102, 103, 104 & 105 (R. 4), and that jurisdiction of the court was invoked because of the rights given it by the Constitution and Laws of the United States (R. 28).

Under Section 1 (4) of the Interstate Commerce Act it is the duty "of every common carrier . . . to provide and furnish . . . transportation . . . to establish through routes . . . and to provide reasonable facilities . . ." etc.; under Section 1 (6), "to establish . . . facilities for transportation . . ., which may be necessary or proper to secure the safe and prompt receipt, handling, transporting and delivery of property . . ."; under Section 1 (4) "to provide and furnish transportation upon reasonable request therefor . . . to provide reasonable facilities for operating such routes"; under Section 1 (11) "to furnish a safe and adequate car service"; under Section 1 (18) ". . . no carrier by railroad subject to this Chapter shall abandon all or any portion of a line of railroad or the operation thereof, unless and until there shall have first been obtained from the Commission a certificate that the present or future public convenience permits such abandonment"; under Section 1 (20) it is provided "any . . . abandonment contrary to the provisions of this Paragraph (or Paragraphs 18 and 19 of this Section) may be enjoined . . ."

By Section 151, Title 45, U.S.C.A., it is provided that all interstate common carriers are included within the provisions of the Railway Labor Act. That Act applies only to interstate common carriers by railroad under the jurisdiction of the Interstate Commerce Commission and subject to the Act to Regulate Commerce.

Section 41 (1), 28 U.S.C.A., provides that District Courts shall have original jurisdiction "of all suits of a civil nature, at common law or in equity, . . . (a) . . . under

the Constitution or laws of the United States * * *"; and sub-section (8) provides "all suits and proceedings arising under any law regulating commerce."

In *Peyton v. Railway Express Agency*, 316 U. S. 350, at 353, 62 S. Ct. 1171, at 1173, this court said:

"Whether a suit arises under a law of the United States must appear from the plaintiff's pleading, not the defenses which may be interposed to, or be anticipated by it. Petitioner's pleading, which we have summarized, satisfies this requirement since it adequately discloses a present controversy dependent for its outcome upon the construction of a federal statute," (Citing cases).

If the plaintiff makes a substantial claim under an Act of Congress, there is jurisdiction whether the claim ultimately be held good or bad. *Louisville & Nashville Railway Company v. Rice*, 247 U. S. 201; 38 S. Ct. 429.

The District Court necessarily was required to construe the duty and obligations of respondent under the federal law known as "An Act to Regulate Commerce" and Acts amendatory thereof, and the Transportation Act, as amended. It was also required to construe and determine the obligations and duties, rights and privileges of respondent under the terms of the Railway Labor Act, Title 45, U.S.C.A., Sections 151-163, and the Norris-LaGuardia Act, Title 29, U.S.C.A., Sections 101, 108. All the rights and privileges, duties and obligations, of the parties to this suit depended upon the proper construction and application of the aforesaid Acts of Congress and the Constitution and laws of the United States.

The opinion of the Circuit Court of Appeals in this case (R. 1020-1031) clearly analyzes the rights and duties of respondent under the Interstate Commerce Act, and the other federal statutes (R. 1024-1028). The court also

quotes from Title 18, U.S.C.A., Sec. 412 (a) (R. 1025-1026), which makes violent interference with such commerce criminal acts.

The decision of the Circuit Court of Appeals is fully supported by the authorities cited in its opinion (R. 1027, 1029, 1030).

The complaint avers that respondent was operating under and bound by the terms and provisions of the Railway Labor Act (R. 4), and petitioners, in paragraph 3 of their answer, admit this allegation (R. 992-993).

The District Court could not decide this case without construing the provisions of the Railway Labor Act, especially those questions relating to whether or not respondent had made every reasonable effort to settle such dispute either by negotiation or with the aid of any available governmental machinery of mediation or voluntary arbitration.

Section 7 of the Railway Labor Act (May 20, 1926), 44 Stat. 582, Section 157, Title 45 (U.S.C.A.) provides that "failure or refusal of either party to submit a controversy to arbitration shall not be construed as a violation of any legal obligation imposed upon such party by the terms of this chapter or otherwise." This provision of the Railway Labor Act is directly involved in this decision by the contention of petitioners that notwithstanding the express provision of that statute respondent was obliged to submit to compulsory arbitration. This assertion made by petitioners as a part of their defense, that respondent did not comply with its statutory duty by refusing to arbitrate, raised a question as to the construction of the Railway Labor Act as applied to the issues in this case, and the trial court decided this question upon the basis of decisions of this court in the Clerks and the Virginian cases. (281 U. S. 548, and 300 U. S. 515, hereinafter referred to.) (R. 954-955).

This Court recognized the equity jurisdiction of federal courts in the following two cases where it considered the constitutionality of the Railway Labor Act, namely: *Texas & N. O. R. Co. et al. v. Brotherhood of Railway and S. S. Clerks*, 281 U. S. 548, 50 S. Ct. 427, and *Virginian Railway Co. v. System Federation No. 40*, 300 U. S. 515, 57 S. Ct. 592. In each of these cases this court sustained a decree for temporary injunction in favor of employees who were bound by that Act, and enjoined the carrier from the violation of certain provisions of the Act.

The first case was decided after the original Railway Labor Act was passed in 1926, the second in 1937 after the Act was amended in 1934, and after Section 8 (Sec. 108, Title 29, U.S.C.A.) of the Norris-LaGuardia Act was passed by Congress in 1932.

In *Virginian Railway Co. v. System Federation No. 40*, 300 U. S. 515, at 550, 57 S. Ct. 592, at 60, Mr. Justice Stone, speaking for the court upon the question of the jurisdiction of a federal court of equity to entertain a suit for injunction and the propriety of relief under the provisions of the Act, said:

"Whether an obligation has been discharged and whether action taken or omitted is in good faith or reasonable, are every day subjects of inquiry by courts in framing and enforcing their decrees."

Also, in 300 U. S. 552, 57 S. Ct. 602, this court said:

"The decree is authorized by the statute and was granted in an appropriate exercise of the equity powers of the court."

If the federal courts have original jurisdiction to entertain a suit by the employees to enjoin the employer (as recognized by this court in the above cases), then the court has jurisdiction to entertain a suit in equity brought by the employer (the railroad) where the subject matter of

the suit arises under the Railway Labor Act, and involves the mutual duties and obligations of the railroad and the employees in a labor dispute.

The original Interstate Commerce Act was passed by Congress in 1887, and the first case involving the construction of the Act, so far as it relates to the duties and obligations of an interstate carrier, was decided on April 3, 1893, by Judge William H. Taft, then a Circuit Judge (later Chief Justice of this court). This was *Toledo, Ann Arbor & North Michigan Ry. Co. v. Pennsylvania Co.*, 54 Fed. 730 (and a companion case in the same volume at 746). Judge Taft, in granting a temporary injunction restraining several railroad defendants and their employees in a labor dispute from refusing to handle cars containing interstate traffic tendered by plaintiff, at page 732 said:

"The jurisdiction of this court to hear and decide the case made by the bill cannot be maintained on the ground of the diverse citizenship of the parties, for the complainant and at least one of the defendants are citizens of the same state. If it exists, it must arise from the subject matter of the suit. The bill invokes the chancery powers of this court to protect the complainant in rights which it claims under the Act of Congress passed February 4, 1887, (24 St. at Large, P. 379) known as the 'Interstate Commerce Act,' and an Act amending it passed March 2, 1889, (25 St. at Large, P. 885). These Acts were passed by Congress in the exercise of the power conferred on it by the federal constitution (Article I, Sec. 8, Para. 3) 'to regulate commerce with foreign nations, among the several states, and with the Indian tribes'. Counsel for defendant Arthur contend that the interstate commerce law, and its amendments are only declaratory of the common law, which gave the same rights to

complainant, and that, therefore, this is not a case of federal jurisdiction. The original jurisdiction of this court extends by Act of Congress passed August 13, 1888, (25 St. at Large, P. 443) to 'all suits of a civil nature, at common law or in equity, * * * arising under the constitution or laws of the United States.' * * * It is immaterial what rights the complainant would have had before the passage of the interstate commerce law. It is sufficient that Congress, in the constitutional exercise of power, has given the positive sanction of federal law to the rights secured in the statute, and any case involving the enforcement of those rights is a case arising under the laws of the United States."

There was a violation of this injunction, and contempt proceedings were instituted resulting in the imprisonment of one Lennon. Lennon filed a petition for writ of habeas corpus, which was decided by the Circuit Court for the Northern District of Ohio, and the order of contempt affirmed. Lennon appealed from that order direct to this court, where the appeal was dismissed. (150 U. S. 393; 14 S. Ct. 123.)

Lennon then appealed the contempt order to the Circuit Court of Appeals for the Sixth Circuit, where the decree of the lower court was affirmed. Certiorari was granted by this court, and on hearing here it was held that Judge Taft had jurisdiction to enter the original decree for injunction, and Mr. Justice Brown in that case, *Ex parte Lennon*, 166 U. S. 548, 17 S. Ct. 658, at 660, said:

"* * * we think the bill exhibited a case arising under the constitution and laws of the United States, as it appears to have been brought solely to enforce a compliance with the provisions of the interstate commerce act of 1887, and to compel the defendants to com-

ply with such an act, by offering proper and reasonable facilities for the interchange of traffic with complainant, and enjoining them from refusing to receive from complainant, for transportation over their lines, any cars which might be tendered them. It has been frequently held by this court that a case arises under the constitution and laws of the United States whenever the party plaintiff sets up a right to which he is entitled under such laws, which the parties defendant deny to him; and the correct decision of the case depends upon the construction of such laws."

At pages 26 and 27 of the brief, petitioners discuss the decision of this court in the *Lennon* case, and state that it was decided almost a half century before the Norris-La-Guardia Act, which prohibits an injunction to compel employees to work under any circumstances. This Court in the *Lennon* case did not pass upon the question as to whether it had power to compel the performance of a contract for service, as inferred by petitioners here (pp. 18, 19). But this Court did decide the question of jurisdiction of the federal courts to entertain a suit for injunction upon the basis *that Congress imposed upon interstate carriers the duty to furnish reasonable facilities for the interchange of interstate traffic, and that the acts of the defendants in that case directly affected a right and duty of the carrier arising under the Commerce Act.*

In instant case respondent at no time has asserted that any court has jurisdiction to compel an employee to continue in service or to perform any service, as that would be contrary to the express provisions of the Railway Labor Act. The injunction in instant case expressly limits its effect to the interference with interstate traffic by the striking employees as a result of *their violent acts or threats of violence*, and the court clearly stated, not only in his oral opinion in deciding the case, but in the order

for injunction, *that it had no effect whatsoever upon petitioners' right to strike or their right to refuse to work* (R. 981).

It is said in the brief (P. 27) that the *Lennon* case was completely different from this case because it was bot-tomed on the statutory violation by the defendants in re-fusing to accept interstate freight, and that the purpose of that suit was to force acceptance of freight. Petitioners recognize by their argument that Congress did impose obligations upon interstate carriers, the violation of which give the federal courts jurisdiction in equity cases. A care-ful analysis of the issues in instant case will demonstrate that the fundamental principle in this case, and in the *Lennon* case, is exactly the same.

It was the duty of respondent under the Commerce Act to deliver freight and furnish reasonable facilities for the interchange of interstate freight with other carriers. The complaint here shows, and the evidence proves, that re-spondent was prevented on many occasions, specifically described by the testimony of the witnesses, in making de-livery of interstate freight to other carriers, due to the fact that petitioners, *not by refusing to work, but by force and violence, and by threats of force and violence*, pre-vented respondent from making these deliveries and to per-form its duties and obligations.

The purpose of the present action was simply to forbid striking employees (petitioners) from interfering with the movement of interstate freight *by reason of their acts of violence and threats of violence*. The decree in this case granting the temporary injunction in nowise violates either the letter or spirit of the Norris-LaGuardia Act, and it in no way interferes with the right of petitioners to strike. It does not in any way seek to compel them to con-tinue to work under any circumstances.

What has been said above with reference to the *Lennon* case applies equally to the comment of petitioners on *Wabash Co. v. Hannahan*, 121 Fed. 563, and the other cases which they discuss. Petitioners are incorrect in assuming as a basis for the argument with reference to these cases, that the injunction in instant case was granted to restrain the Brotherhood leaders and employees from striking for a wage increase, or that the injunction was contrary to the letter and spirit of the Norris-LaGuardia Act.

No Federal Court has yet held that an injunction may not be granted restraining an employee from violence and threats of violence, so long as that striking employee's rights to strike are not interfered with by the writ. That is all that the Norris-LaGuardia Act attempts to accomplish, namely: that there shall be no injunction restraining rights of employees to strike, or interfering with their union activities. The Court, having protected these fundamental rights, then has the right and power to prevent violence and threats of violence against the employer.

The order in instant case from which the appeal was taken, expressly reserves all of the rights guaranteed to an employee by the Norris-LaGuardia Act, and these rights are clearly and specifically set out in the order for temporary injunction (R. 981-982).

In *Macon Grocery Co. v. Atlantic C. L. R. Co.*, 215 U. S. 501, 30 S. Ct. 184, at 186, 187, this Court approved the rule announced in the above case by Judge Taft.

In *Mulford v. Smith*, 307 U. S. 38, at 46, 59 S. Ct. 648 at 651, this Court speaking through Mr. Justice Roberts said, page 46:

"Before coming to the merits we inquire whether the court below had jurisdiction as a federal court or as a court of equity. Though no diversity of citizenship is alleged, nor is any amount of controversy

asserted so as to confer jurisdiction under sub-section (1) of Section 24 of the Judicial Code, the case falls within sub-section (8) which confers jurisdiction upon District Courts 'of all suits and and proceedings arising under any law relating to commerce.' "

In the recent cases of *Southern Pacific Co. v. Peterson* and *A. T. & S. Fe Ry. Co. v. same*, 43 F. (2d) 198, the court said at 201:

"If, as alleged in the bills, the interstate traffic over the plaintiffs' lines is hindered, delayed and burdened to such an extent as to amount to an unlawful interference with or regulation of interstate commerce, then a cause of action exists calling for equitable relief. These allegations of the bill are specifically denied by the defendant. An issue is thereby tendered and a case presented of which the federal court has jurisdiction."

In the case of *The Fair v. Kohler Die & Specialty Co.*, 228 U. S. 22, at 25, 33 S. Ct. 410, at 412, the Court said:

"* * * if the plaintiff really makes a substantial claim under an Act of Congress, there is jurisdiction whether the claim ultimately be held good or bad."

The petitioners in their brief (Pgs. 30-31) have misconstrued the effect of the decision of the Circuit Court of Appeals. In effect they say that if a federal statute imposes a duty upon a person, that judicial interpretation may read into that statute a provision that such person has an implied federal right to be free from any act tending to obstruct or prevent the performance of that duty, and a federal court will hear cases seeking remedies for a breach of such an implied right.

In the first place, the premise from which this argument stems has no application to instant case. The rights and

duties of an interstate carrier are in no way implied. These rights have been *definitely fixed* by statutory enactment beginning with the passage of the original Interstate Commerce Act in 1887. In the second place, petitioners overlook the fact that the Constitution of the United States gave power to Congress to regulate interstate commerce, and Congress entered the field of regulation of commerce between the States when it passed the act of 1887, and by so doing excluded all interference by a state in that field.

All of the cases above cited show that the federal courts have recognized that Congress, by the passage of the Interstate Commerce Act in 1887, took *exclusive jurisdiction* in determining the duties and obligations of carriers of interstate freight, and no court, State or Federal, has ever held that any of the duties and obligations of carriers under that Act are subject to state legislation or regulation by a state.

In *Railroad Commission v. Worthington*, 225 U. S. 101, 32 S. Ct. 653, at 655, this Court said:

"It is not necessary to review the cases in this court which have settled beyond peradventure that the national government has exclusive authority to regulate interstate commerce under the Constitution of the United States."

Petitioners at pages 30 and 31 of their brief discuss the large volume of litigation in state courts resulting from automobile negligence cases, and say that federal law imposes upon common carriers by truck the duty to furnish transportation and facilities, and conclude with the unwarranted assertion that under the reasoning of the Circuit Court of Appeals in instant case a trucker would have a federal right to be free from *any act* obstructing or impeding the movement of the truck, and a remedy in the federal courts for his damage.

This argument is unsound, and is completely answered by the decision of the Circuit Court of Appeals of the Seventh Circuit in *Sharp v. Barnhart*, 117 F. (2d) 604, in the opinion by Judge Evans, which case involved the stoppage of a motor truck. In this opinion, Judge Evans very clearly draws the distinction between the right of the operator of a truck engaged in interstate commerce and one which is under the terms and provisions of the Motor Carrier Act of Congress, and there points out that the operation of motor vehicles on the public highways of the State are subject to the local supervision and local laws with reference to the operation of said vehicle. Also see *Welch Co. v. New Hampshire*, 306 U. S. 79, at 85, 59 S. Ct. 438, at 441; 83 L. Ed. 500, and the cases there cited.

A motor truck is operated upon a public highway which is used by the public generally either for the purpose of hauling interstate freight, intra-state freight or the operation of private motor cars, and Congress by passing the Motor Carrier Act of 1935, 49 U.S.C.A. 301 et seq., did not intend to supersede or suspend the exercise of the reserve powers of a State in controlling all traffic upon public highways, and the Motor Carrier Act was not extended to cover ordinary traffic safety regulations, but these regulations were left to the State.

The distinction between the Interstate Commerce Act as applied to railroads, and the Motor Carrier Act of 1935, is one of the scope of assumption of authority and control by Congress. Under the Interstate Commerce Act, Congress assumed and has retained the exclusive field, to regulate and control, while in the Motor Carrier Act, Congress has taken jurisdiction only in a limited manner:

Under all of the decisions of this court and the Circuit Courts of Appeal, the distinction here made has been recognized, and the federal courts are vested with jurisdiction in cases arising in *this exclusive field of interstate transportation by railroads*.

The concern of counsel for petitioners that the decision of the Circuit Court of Appeals in instant case will result in clothing federal courts with further power to consider a great volume of motor vehicle cases is unfounded and unwarranted. As pointed out by Judge Evans in *Sharp v. Barnhart*, 117 F. (2d) 604, the federal courts are vested with jurisdiction in motor carrier cases only where the vehicle owner has fully complied with the provisions of the Federal Act, and as he so clearly states in that opinion, the motor vehicle carrier, even though transporting interstate commerce, is not under the protection of the federal courts if he has not brought himself within the qualifications required by that Act.

Under all the above cases and the facts alleged in the complaint in this case and proven on the trial, it clearly appears that this suit really and substantially involved a dispute or controversy respecting the construction or effect of the Interstate Commerce Act, the Transportation Act, the Railway Labor Act, the War Utilities Act, and the Norris-LaGuardia Act, and that the result depended upon such determination by the District Court. Under such circumstances the District Court had original jurisdiction of the controversy.

IV.

The undisputed evidence offered by respondent shows that the public officers charged with maintaining order were unable or unwilling to furnish adequate protection for respondent's employees and its property against the violence and threats of violence of the petitioners.

Respondent, in answer to petitioners' argument under this point, suggests three propositions for consideration, as follows:

1. The findings of the District Court (R. 970-977; R. 981-982), and approved by the Circuit Court of Appeals in its opinion (R. 1027-1029), are binding upon petitioners.

2. The concurrent findings of fact of the two courts below are not shown by petitioners to be erroneous or unsupported by substantial evidence, and under the well established rule of this court, these findings are accepted here as unassailable. *Virginian Railway Co. v. System Federation No. 40*, 300 U. S. 515 at 542, 57 S. Ct. 592 at 596; *Texas & N. O. R. Co. v. Brotherhood of Railway & Steamship Clerks*, 281 U. S. 548 at 558, 50 S. Ct. 427 at 429; *Alabama Power Co. v. Ickes*, 302 U. S. 464 at 477, 58 S. Ct. 300 at 303.

3. The plain meaning of the statute (Section 7, Norris-LaGuardia Act) is that respondent was entitled to *adequate protection* for its property and the safety of its employees, and not merely a pretense of protection, as the evidence in this case shows was the extent of the protection offered or furnished by the public officers charged with the duty of law enforcement.

Upon the trial of this case in the District Court, petitioners made no effort to dispute the voluminous evidence offered by respondent, proving that the striking petitioners were guilty of violence, threats of violence, and interference by violence, with the movement of interstate trains. Not a single witness was called by petitioners to dispute the fact that petitioners in over fifty separate instances did interfere, by violence, with the operation and movement of interstate trains and interstate freight, preventing respondent from the performance of its statutory duty under the Interstate Commerce Act, as an interstate carrier of freight. (See Exhibit 21, R. 702, attached to this brief as an appendix, giving the date and places upon said railroad where respondent's proof shows violent interference with the movement of interstate trains.)

Under this point, petitioners challenge the sufficiency of the evidence to sustain the charge in the complaint that the public officers were unable or unwilling to furnish ade-

quate protection, as provided by Section 7 of the Norris-LaGuardia Act.

The challenge of petitioners is not specific. Petitioners say (Br. 32) that plaintiff's evidence relates to incidents of disturbance and violence on certain days, but that there is no evidence that the police officers and sheriffs were unable to handle any disturbance or situation to which their attention was called, or which came to their notice. The brief of petitioners fails to point out by record references the lack of substantial evidence, and the only references are to immaterial statements of certain witnesses.

This Court has adhered to the rule stated in *Virginian Railway Co. v. System Federation No. 40*, 300 U. S. 515; 57 S. Ct. 592 at 596, where the Court said:

"The concurrent findings of fact of the two courts below are not shown to be plainly erroneous or unsupported by evidence. We accordingly accept them as the conclusive basis for decision."

Petitioners have not shown that the findings of the District Court and the Circuit Court of Appeals are plainly erroneous or unsupported by evidence. On the other hand, respondent contends that these findings are supported by substantial evidence, and that the rule with reference thereto, as announced in *Alabama Power Co. v. Ickes*, 302 U. S. 464; 58 S. Ct. 300 at 303, should govern in this case. This Court there said:

"These findings were made, after hearing by the District Judge upon undisputed or conflicting evidence. These findings were not questioned by the court below; and since they are not without substantial support in the evidence, we accept them here as unassailable."

Respondent, therefore, submits that since the District Court made the findings upon evidence which is uncontra-

dicted, except in very minor respects, and the Circuit Court of Appeals has not questioned those findings, that this Court should accept the same as unassailable.

Respondent directs this Court's attention to the fact that the trial judge, after sitting for almost two weeks and hearing one hundred seven witnesses in the case, found against petitioners on this point, and that these findings, supported by substantial evidence, should not be overturned simply because the petitioners make an assertion, without pointing out wherein these findings are plainly erroneous or unsupported by evidence.

The substantial evidence offered by respondent shows that acts of severe violence were committed by petitioners in nine counties in the State of Illinois through which the railroad passes. The most serious acts of violence against respondent's property and its employees occurred in Peoria and Tazewell Counties. The terminal and yards are located in East Peoria. To refute the incorrect statements of petitioners in their brief as to the nature and extent of the violence, respondent here cites the record pages where substantial evidence may be found, showing that the acts complained of were not isolated incidents, as petitioners would have this Court believe, but were the acts of mobs, which, in several instances, stopped interstate trains and brutally assaulted train employees, driving them from their posts upon the locomotive and train. These references are as follows: (R. 81-92, 105-117, 140-144, 166-167, 172-180, 190-199, 202-207, 219-232, 234-240, 241-254, 281-292, 293-302, 326-327, 330-332, 356-360, 361-367, 408-420, 443-459, 463-476, 502-507, 511-520, 521-525, 537-547).

On several occasions, trains passing from the yards in East Peoria through the city, were stopped by mobs, which included a great number of petitioners, who were identified in open court as participants in these acts. On one occasion, at Swords' Siding, switch engine No. 70, with a num-

ber of cars attached (all loaded with interstate freight) was stopped. The engineer and fireman were driven from the engine by the throwing of bricks and stones, and other trainmen were likewise driven from the train (R. 280, 292, 293, 302, 326, 327, 330 and 332). The fireman on that train, Don Dubois, attempted to escape from the mob, and was pursued by several persons, and finally overtaken by one of the petitioners, William L. Brown (R. 293-295), who assaulted Dubois with a gas hose nozzle, and left him lying in an unconscious condition on the street. William L. Brown was identified in open court, and did not testify for himself or the other petitioners. Acts of this character cannot be characterized as incidents of disturbance, as petitioners have attempted to do in their brief.

Several other trains were stopped by mobs, which mobs in each instance included a number of petitioners, all of whom were identified in open court as participants in the acts of violence, and in many instances, these petitioners, notwithstanding their positive identification in open court, failed to testify and deny the facts charged against them.

In the testimony of the following named witnesses, the Court will find that these acts were of the most vicious and violent character. It will also find that the men who committed these dastardly, unlawful assaults upon the trainmen operating the interstate train in question, did not deny their participation therein. (See testimony of the following witnesses: John H. Sweet, R. 140-145; E. P. Owen, R. 172-184; C. L. Carnarius, R. 190-210; E. A. Lawson, R. 241-254; Larry Ward, R. 218 to 232; Omar C. Gulick, R. 462 to 469; E. R. Funk, R. 443 to 459; Harold E. Kipling, R. 408 to 442; L. E. McAvoy, R. 488-494; Leland Ruddell, R. 511-520).

The train referred to in the testimony of the foregoing witnesses was Extra No. 41 West, on January 2, 1942. It was an interstate train carrying important freight, in-

cluding war materials, from Peoria, Illinois, to Keokuk, Iowa (R. 612-614; Exhibits 8 to 18; R. 613-614).

The Sheriff of Peoria County testified that on December 28, 1941 and January 2, 1942, a request was made at his office for protection of the property and men of respondent, and that he informed the president of respondent railroad that he could not protect the respondent and its property in this strike, because he had an inadequate force; that his total force consisted of only six un-uniformed men (R. 380-386). He further testified on cross-examination that on January 2, 1942, his office received a call advising that there was a possibility of violence in the vicinity of Hollis, and that some men should be sent to that point to preserve the peace. That request was made before extra No. 41 West above referred to had left the Union Station. The proof further shows that no deputies from the sheriff's office ever appeared or made any arrests or attempted arrests, and that nothing was done that day to protect the property or the men operating that train. The only arrests made on the day in question were by Harold E. Kipling, chief special agent of respondent, who arrested Lucas and Totten, two of petitioners who attempted to destroy the locomotive on extra No. 41, and injure the men in the cab by throwing bottles of inflammable material, which exploded inside the cab, setting fire to it and injuring several of the employees.

On December 20, 1941, Zeno Merrill was assaulted by ten or fifteen men as he was leaving respondent's East Peoria yards, and was seriously injured as a result of the treatment he received at their hands. He swore out warrants for the men he was able to identify, and these were arrested, but immediately released on bond (R. 81, 92, 102-117, 723).

On the morning of December 31, 1941, president of respondent telephoned Sheriff Donahue of Tazewell County,

asking if he would have deputy sheriffs at the entrance to the lane to prevent further trouble (R. 723-724). The sheriff said he would come over and investigate the situation, and would try to have some one at the entrance to the lane on twenty-four hour duty but that, as to preventing trouble, he didn't know how much could be expected. The sheriff also told the president of respondent that the men arrested for the assault on Merrill were let out almost immediately, and that Judge Donaldson, County Judge of Tazewell County and City Attorney of East Peoria, was representing the Brotherhoods and their members and that, with this set-up, nothing could be accomplished by arresting people, as they would be let out through Judge Donaldson's influence as fast as they were brought in for arrest (R. 724). The Judge Donaldson mentioned by Sheriff Donahue was one of the Attorneys for petitioners in the District Court, and took an active part in the trial (R. 67, 991-999).

Sheriff Donahue came over to the yards of respondent at about 1 o'clock, and the president and general counsel of respondent had a conference with him and Deputy Goar, at which time Donahue repeated his statements about the ineffectiveness of arresting anyone because of the representation of the Brotherhoods and their members, and that the set-up was bad from respondent's standpoint so far as the local authorities were concerned. He further stated that he only had four men to look after the entire county, and that, while he was willing himself to do what he could, respondent must realize what he was up against, and that the aid he could render was necessarily limited (R. 724-725).

The sheriff did not provide protection for respondent or its men in Tazewell County, and no protection was furnished at any time when trains were stoned and interfered with while in Tazewell County (R. 725).

On January 2, 1942, a wire was sent to the mayor of East Peoria, along with wires to other officials all along respondent's railroad, asking for assistance. Shortly after sending the wire, Mayor Brauns of East Peoria called respondent's president and said: "George, I am sorry I can not do a thing for you" (R. 725). From that time on no protection was furnished respondent's men or property at any time by the mayor's office or the chief of police of East Peoria (R. 725).

On December 31, 1941, when the train crew was assaulted at Swords' Siding in East Peoria, the East Peoria police were called, but they did not arrive until after the train was moved some forty-five minutes later, although a police car could have reached Swords' Siding from the city hall within five minutes after being notified (R. 725-726).

On January 2, 1942, about 8:30 in the morning, Chief Special Agent Kipling advised respondent's president that an attack was being made on extra 41 west (R. 730). A call was immediately made to the sheriff's office of Peoria County, and Deputy Vespa said he would send a car with officers, but the officers did not arrive until after the assault below Allied Mills had taken place (R. 731). Respondent's president also telephoned the state police, advising what had occurred. The deputy reported that he did not know whether they could do anything or not, but that he would call back in five minutes. However, he did not call (R. 731).

Early on the morning of January 2 respondent's president sent wires to the sheriffs of all counties, advising that operations were being seriously interfered with and delayed by acts of violence against train crews, damage and destruction of railroad property and equipment and acts with intent to derail trains, and requested that necessary protection be furnished to prevent such violence and interference with the operation of trains, and requested the

sheriffs to advise by wire collect if they would supply men to protect the operation of trains (R. 732).

No replies were received from the sheriffs of Ford, Tazewell, Peoria, Fulton, Hancock or Henderson Counties, and the sheriffs of Iroquois, Livingston, McLean and McDonough advised that they had no funds with which to give protection (R. 734). The sheriff of Woodford County was the only sheriff replying indicating that he would endeavor to give protection (R. 734).

Respondent's president also, on the morning of January 2, sent similar wires to the mayors of all towns located upon its railroad (R. 734). Most of the replies received advised that they were unable to give the protection requested, and no assistance was received from any of the cities where violence occurred. (See testimony of George P. McNear, Jr. (R. 720 to 752).)

Chief of Police Wright of East Peoria was called by Superintendent Best when a P. & P. U. crew reported that they were prevented from making delivery of cars to respondent. Chief Wright advised Best that he could not guarantee ample protection, and that his two men had no show with forty or fifty pickets (R. 757, 759).

In considering this point, the court should take into account the fact that the railroad extends from Keokuk, Iowa, to Effner, Indiana, across the State of Illinois, and that the strikers could make an attack upon the trains at many points along the public highways crossed by the railroad tracks, and that it would be very difficult for police officers to cope with that situation (R. 700—Exhibit 21).

An examination of the substantial testimony offered in support of the complaint, to be found at the places in the record above referred to, will disclose that the character of the pretended protection that the public officers in one or two instances said they would furnish, was not the *ade-*

quate protection which Congress provided in the Norris-LaGuardia Act, Section 7, the owner of property should have. The refusal or failure of the public officers, to whom appeal was made to protect the property and men of respondent, is clearly apparent from the record.

It should also be noted that the Circuit Court of Appeals also found (R. 1026) and stated the facts on this subject, as follows:

"In instant case, the acts complained of were so violent that plaintiff was forced to abandon temporarily its train service."

It should also be noted, in support of the findings of fact on this point, that the Circuit Court of Appeals, as well as the District Court, found that the acts of violence and threats of violence upon respondent were spread over the entire distance of the length of the railroad from the State of Iowa to the State of Indiana. Under such circumstances, even though a sheriff in one of the eleven counties in Illinois in which this road operates was entirely willing to cooperate within his jurisdiction, viz, his county, his protection even though effective there, would be of no consequence in the other ten counties in the state through which the railroad was operating.

In *Newton v. Laclede Steel Co.*, 80 Fed. (2d) 636 (7th Circuit), December 17, 1931, the court held that the term "public officials" includes the city and county officials, but not the Governor of the state.

The facts in the record in instant case present a more serious condition than existed in *Lake Valley Farm Products v. Milk Wagon Drivers' Union, Local #753*, 108 Fed. (2d) 436 (C.C.A. 7th, Nov. 1939), where that court said:

"With respect to the ability of the police officers to cope with the situation, we think it is clear from the

number of stores involved, and the magnitude and seriousness of the activities which had continued for several years, that the police officers were unable to control the situation." (Italics ours.)

In *Cater Construction Co. v. Nischwitz*, 111 F. (2d) 971 (C.C.A. 7th, 1940) that court said that the Norris-LaGuardia Act contemplates protection which would enable an owner to proceed with the work, or with his business. That decision applies in instant case, because the proof shows that the lack of protection from the public officers prevented respondent from proceeding with the operation of its trains. The undisputed proof is that there was a total cessation of operation of all its trains by reason of the violence, on January 2, 1942, and that this cessation of operation continued until after the granting of the restraining order, and the service of the same upon the petitioners.

The situation, as disclosed by the evidence in this case, is comparable to the facts in *United Electric Coal Co. v. Rice*, (C.C.A. 7th, 1935) 80 F. (2d) 1, in which case the Seventh Circuit Court held that the Norris-LaGuardia Act (28 U.S.C.A. 108) limiting the power of a federal court of equity to grant injunctions in labor dispute cases, does not prevent the court from protecting property from wilful destruction. This court denied certiorari in that case. (*Rice v. United Electric Coal Co.*, 297 U. S. 712; 56 S. Ct. 590.)

At page 33 of petitioners' brief, they refer to *Arkansas v. Kansas & Texas Coal Co.*, 183 U. S. 185 at 188; 46 L. Ed. 144-146; 22 S. Ct. 46, and cite that case as an authority in support of their contention. An examination of that case will disclose that it has no bearing whatsoever upon the issues here presented. That case did not involve the question of interstate commerce. The State of Arkansas filed

a suit for injunction to enjoin the coal company from importing large bodies of armed persons into the State of Arkansas, and it was contended that these persons were lawless or riotous persons, or ones affected with contagious or infectious diseases that might endanger the peace, good order or good health of the state, or create a public nuisance. Mr. Justice Fuller, in the opinion, says:

"In this case the state (plaintiff) asserted no right under the Constitution or laws of the United States, and put forward no ground of relief derived from either. There was no averment on which the state could have invoked the original jurisdiction of the Circuit Court, under Section 1 of the Act * * *."

A careful consideration of that case will disclose that none of the issues there involved had any relation to a federal question.

Both the District Court and the Circuit Court of Appeals have found that the record here contains substantial evidence showing the public officers under duty to protect respondent were either unable or unwilling to furnish adequate protection. Under the authorities above cited, such concurrent findings of fact, not being shown to be plainly erroneous or unsupported by evidence, are accepted as conclusive. These findings show respondent's complete compliance with the requirements of Section 7 (107, Title 29, U.S.C.A.) of the Norris-LaGuardia Act.

V.

The undisputed evidence offered by respondent shows it complied with all the obligations imposed upon it by the Railway Labor Act, and Section 108 of the Norris-La-Guardia Act. The findings of the District Court on this point, approved by the Circuit Court of Appeals, are supported by substantial evidence.

On the question as to whether respondent had complied with the provisions of the Railway Labor Act as a condition to its right to seek injunctive relief, the District Court and the Circuit Court of Appeals found the facts as follows, to-wit:

"On December 17, 1940, and January 7, 1941, plaintiff delivered its proposed schedules of rules, working conditions and rates of pay. The services of the Mediation Board were invoked on January 15, 1941, and attempts to reach an agreement between the parties continued by the Board until November 21, 1941, when both parties refused to arbitrate and the Board terminated its mediation efforts. Prior to this, plaintiff had submitted its revised and amended proposals of rates of pay, rules and working conditions on November 3, 1941. On December 21, 1941 plaintiff notified defendants that its revised schedules would go into effect on December 29, 1941, and at 12:01 A.M. December 29, 1941 defendants struck. Defendants knew of plaintiff's revised schedule November 3, 1941 and the Mediation Board gave written notification of its withdrawal from the mediation proceedings on November 21, 1941. Both events occurred more than 30 days prior to the date when plaintiff's orders were put into effect" (R. 1031).

Following this finding of fact, the Circuit Court of Appeals then makes its final conclusion as follows:

"Since section 155 was the guiding section when the controversy was submitted to the Mediation Board, and more than 30 days had elapsed after the Board's withdrawal before any change in plaintiff's rates of pay, rules and working conditions, plaintiff complied with the Act" (R. 1031).

The District Court made a specific finding of fact (R. 970), Par. (d):

"That the plaintiff has in good faith complied with all of the provisions of the Railway Labor Act in endeavoring to reach an agreement with the Brotherhoods and its employees; that the plaintiff has complied with all its obligations imposed upon it by the laws of the United States relating to labor disputes."

The above concurrent findings of fact of the two courts below are not shown by petitioners to be erroneous or unsupported by substantial evidence, and under the well established rule of this court these findings are accepted as unassailable.

Petitioners admit in their brief (page 37) that respondent was under no legal compulsion to submit to arbitration. Taking this as their construction of Section 7 (Sec. 157, Title 45 U.S.C.A.) of the Railway Labor Act, which provides:

"The failure or refusal of either party to submit a controversy to arbitration shall not be construed as a violation of any legal obligation imposed upon such party by the terms of this chapter or otherwise,"

there is no merit whatsoever in their argument that respondent could not enjoin petitioners from acts of violence and threats of violence.

If respondent complied with the provisions of the law, then it has performed all conditions required of it for injunctive relief.

Both lower courts have found that a good faith effort was made by respondent to settle the dispute. If respondent was not obliged to submit to compulsory arbitration, there was no other means of settling or attempting to settle the dispute, and especially in view of the fact that the undisputed evidence in the record shows that the Brotherhoods advised the representatives of respondent before the mediation proceedings had formally terminated *that there was no rate of pay to which they would agree under the schedules respondent submitted on November 3, 1941* (R. 782).

These schedules did not become effective for thirty days after November 21, 1941, and in fact were not actually put into effect until December 29, 1941. More than the thirty days statutory period had elapsed after the formal termination of the mediation proceedings before these schedules became effective.

In addition thereto, Section 5 (Sec. 155, Title 45 U.S.C.A.) of the Railway Labor Act, provides that during the thirty day period after the termination of the mediation proceedings nothing shall change the finality of the termination of the mediation proceedings, except the appointment of an emergency board under Section 10 (Sec. 160, Title 45 U.S.C.A.) of the Railway Labor Act, or *an agreement of the parties to arbitrate*.

The record in this case shows that on November 17, 1941, respondent urged the Mediation Board to request the President to appoint an emergency board as provided in Section 10, and this request was made repeatedly until the strike occurred (R. 782, 785). No action was taken by the Mediation Board to request the President to appoint an emergency board as contemplated by the statute.

The Circuit Court of Appeals made the following finding of fact:

"An examination of the record indicates, however, that it made an effort by mediation to reach a satisfactory arrangement with defendants, and that, after nearly a year of negotiations, the Mediation Board terminated the proceedings after arbitration proposals submitted by it were refused by both parties. Plaintiff further sought to reach a satisfactory agreement with defendants by suggesting that an emergency board be appointed by the President, as well as that an impartial committee be appointed to examine the dispute. It is thus apparent that there was no lack of good faith by plaintiff to bar its right to an injunction because of refusal to arbitrate" (R. 1029).

This court has definitely decided that the obligation upon a railroad with reference to arbitration in a labor dispute is a voluntary choice, and not compulsory. The first case was *Texas & N. O. R. Co. v. Brotherhood of Railway and Steamship Clerks*, 281 U. S. 548, 50 S. Ct. 427, decided May 26, 1930, where Mr. Chief Justice Hughes (281 U. S. 564, 50 S. Ct. 431) said:

"While adhering in the new statute to the policy of providing for the amicable adjustment of labor disputes and for *voluntary submissions to arbitration as opposed to a system of compulsory arbitration*, Congress buttressed this policy by creating certain definite legal obligations. . . . *The arbitration is voluntary*, but the award pursuant to the arbitration is conclusive upon the parties as to the merits and facts of the controversy submitted." (Italics ours.)

The second case was decided after the amendment of the act in 1934, and was *Virginian Ry. Co. v. System Federation No. 40*, 300 U. S. 515, 57 S. Ct. 592 (decided March 29, 1937).

The construction of the provisions of the Railway Labor Act in instant case by the Circuit Court of Appeals is squarely in line with the construction placed upon it by this court in the above cases, so far as the duty to arbitrate is concerned.

Counsel for petitioners misconstrues the meaning and intent of Section 155 of the Railway Labor Act (Title 45, U.S.C.A. 155) so far as it relates to the question of the duty of respondent to mediate or arbitrate, as a prerequisite to an application for injunctive relief. At page 37 of their brief they say that the clear intent of Congress was to induce settlement of a labor dispute without resorting to the courts, and adjustment without work stoppages, and following that assertion the inference of petitioners' argument is that a failure to submit to arbitration shall be sufficient to deprive the plaintiff of injunctive relief.

It was not the intention of Congress to force a carrier to submit to arbitration if mediation is resorted to and fails. This would result in the denial of the right of a carrier to secure injunctive relief to prevent the wilful and unwarranted destruction of its property and the interruption of its business.

The good faith of respondent cannot be questioned in this case, because the evidence is undisputed that following the elections for the purpose of selecting representatives, which occurred in the fall of 1940, it recognized no group, except the representatives chosen at that election. From that time to the date of the termination of the mediation proceedings, which occurred on November 7, 1941, it constantly engaged in mediation proceedings with the representatives of the Brotherhoods chosen at the elections, and the negotiations conducted by the mediator selected by the Railway Labor Act.

. It submitted its new schedule of rates of pay and working conditions on November 3, 1941, and these were considered in the mediation proceedings until November 6, 1941, when respondent was advised by the representatives of the Brotherhoods that they could not agree to the proposals. Respondent then requested the Brotherhoods to suggest a rate of pay for which they would be willing to agree to the rules and working conditions (R. 782). On the day following, respondent was informed by the representatives of the Brotherhoods that they would not name a rate of pay for which they could accept the proposed rules and working conditions. The mediator then handed both parties joint arbitration proposals, and these were refused by both parties (R. 782)..

On November 17, 1941, respondent requested the Board to appoint some impartial fact-finding commission to consider the matters involved in the dispute, and also asked the Board to request the President to appoint an emergency board, as provided by the Railway Labor Act. Such requests were ignored (R. 785-786), and the mediation proceedings terminated on November 7, 1941 and formal notice, as required by the statute, was given to the parties on November 21, 1941 (R. 782-783).

Prior to that time, both parties had refused to arbitrate. The statute provides that if arbitration is refused by one or both of the parties, the board shall at once notify both parties in writing that its mediatory efforts have failed (Title 45, U.S.C.A. Sec. 155). The board gave this notice in writing on November 21, 1941. From November 21, 1941 until December 21, 1941, respondent was not permitted by the terms of the statute to change the rates of pay, rules or working conditions, but these were frozen for the period of thirty days subsequent to November 21st.

The statute expressly provides that after the expiration of thirty days from the date of the termination of the mediation proceedings by the mediation board, the carrier may change rates of pay, rules or working conditions, *and no notice to the employees, either oral or in writing, is required by the Act, prior to the effective date of the change.* The notice given by the carrier in instant case on November 21st, that it intended to put into effect the rates of pay, rules and working conditions as submitted of November 3, 1941, was not required by any provision of the Act. The giving of such notice had no bearing whatsoever upon the right of respondent to make the change effective December 29th. In other words, the carrier has the right to make any change it desires providing it does not make the change until after thirty days has expired from the date the board notifies both parties in writing that its mediatory efforts have failed. That provision of the statute which so clearly sets forth this procedure, is as follows:

"If arbitration at the request of the board shall be refused by one or both parties, the board shall at once notify both parties in writing that its mediatory efforts have failed, and for 30 days thereafter, unless in the intervening period the parties agree to arbitration, or an emergency board shall be created under Section 160 of this chapter, no change shall be made in the rates of pay, rules, or working conditions or established practices in effect prior to the time the dispute arose" (Title 45, U.S.C.A. Sec. 155).

The evidence shows that respondent was in good faith in instant case in endeavoring to settle this dispute, for the reason that it persisted in its efforts to have the mediation board recommend to the President of the United States the creation of an emergency board, as provided by Section 160 (R. 784-785).

After the termination of the mediation proceedings, which the record shows were conducted in good faith by respondent, it sought the appointment of an emergency board as provided by the Railway Labor Act.

Section 160 (Title 45, U.S.C.A.) was passed by Congress May 20, 1926 and amended June 21, 1934, to meet the exact situation which is presented in instant case. This section provides for procedure which would have prevented a strike, had the mediation board complied with its mandatory provisions. It is there provided that in the event a dispute between a carrier and its employees is not adjusted by mediation, and that if there is a threat of interruption of interstate commerce to a degree such as to deprive any section of the country of essential transportation service, the mediation board *shall notify the President*, who, in his discretion, may create a board to investigate and report respecting such dispute. This language does not give the mediation board a discretion, *but a mandate, that it shall notify the President.*

There is no question in the record that a strike was threatened on December 8, 1941, and the board knew that service would be interrupted, because it was notified of the strike notice to the employer, and requested the Brotherhoods not to strike. Notwithstanding, the fact that the evidence was in possession of the board that threats were of a substantial nature which, if carried out, would interrupt interstate commerce, the board did not notify the President, but ignored the request of the carrier.

The carrier was seeking an impartial tribunal. Section 160 provides that no member appointed to that board by the President shall be pecuniarily or otherwise interested in any organization of employees or any carrier. Respondent asked for the appointment of a board so constituted, and was willing to submit its case to that board.

This section also provides that after the creation of the board, and for thirty days after the board has made its report to the President, no change except by agreement shall be made by the parties to the controversy in the conditions out of which the dispute arose.

If the mediation board had performed its duty and notified the President of the conditions of the threatened strike and interruption of service, and the President had appointed this impartial board, no strike could have occurred, because respondent was not permitted to make any change in the rates of pay, rules and working conditions during the time of the existence of that board, and for a period of thirty days after its report to the President.

The evidence in this case shows the urgent request for the appointment of an emergency board, made by respondent in its telegrams to the board dated December 18, 1941, December 20, 1941 and December 28, 1941 (Exhibits 29-30 and 31, R. 785-778). The originals of these exhibits have been certified to this court as a part of the record. The record shows that no action was taken by the mediation board upon the request of respondent, and that the board did not request the President, as it is required to do under Section 160, to appoint this impartial emergency board (R. 788-789).

It is argued in petitioner's brief that respondent offered no explanation or justification for its refusal to arbitrate under the auspices of the Mediation Board. The excuse and justification are very apparent from the testimony in this record. The undisputed evidence is (R. 782) that on November 6, 1941, the Brotherhoods flatly refused the proposed schedules of respondent, and stated to respondent's representatives, in the presence of the mediator, that they would not submit any rate of pay under the proposed schedules. This was an ultimatum which indicated the arbitrary attitude of the Brotherhoods, and respondent had reached the point where its only recourse was to

request an impartial body, namely: an emergency board, to hear the evidence and decide the issues involved.

There is no presumption that this governmental agency would be fair, just and impartial, in the conduct of the arbitration, and with the experience which the respondent had had in the mediation, it could not be charged with bad faith in refusing to sign an arbitration agreement, where the arbitration proceedings were to be conducted under the same atmosphere.

Respondent has always insisted upon a fair and impartial hearing of this labor dispute before a body which has no connection with either the Brotherhood interests or the railroad interests, and to this date it has been unsuccessful to have its case presented to a body of that character.

Petitioners say (Br. 10) that the President's executive order shows that it was issued because of the railroad management's refusal to settle the same labor dispute out of which this court proceeding arose. There is no evidence in this record to support these statements, nor is there any evidence, that when the government took over the road, the same rates of pay and working conditions then in effect on other railroads in the United States became operative on this road, with the resulting suspension of the strike.

Petitioners also say that the president of the railroad has requested the Office of Defense Transportation to return the road to its corporate management. There is no evidence in the record to support this statement.

The fact is that this entire labor dispute is based upon the contention of the Brotherhoods of their claimed right to enforce the commonly known "feather-bed rules" upon this railroad.

Mr. Joseph B. Eastman took over the operation of this railroad in March, 1942, and tried out the "feather-bed

rules," and, according to his own statements contained in a pamphlet recently published by him as the Director of the Office of Defense Transportation, he says he has modified certain of the "feather-bed rules" on the Peoria road. After Mr. Eastman published this pamphlet saying that the road was now being operated without the burden of certain of "feather-bed rules," and the waste of manpower and equipment by reason thereof, the management of the respondent advised him that it would take the road back and operate it.

Petitioners do not at any point in their brief say that respondent failed to mediate the dispute, as required by the provisions of the Railway Labor Act. There is no criticism by petitioners of the manner of the mediation, nor is there the slightest suggestion that respondent failed to comply in good faith with all of the requirements of the act *relating to mediation*.

The Railway Labor Act contemplates the settlement of labor disputes through conferences, or mediation, or voluntary arbitration. The Norris-LaGuardia Act requires that every reasonable effort to settle the dispute be made either by negotiation or with the aid of any governmental machinery of mediation or voluntary arbitration. *There is no requirement in either Act that the employer must mediate, and also submit to compulsory arbitration.*

Petitioners admit in their argument that the respondent was under no legal compulsion to submit to arbitration, and that is true under the decisions of this court. The cases heretofore cited, namely: *Texas & N. O. R. Co. v. Brotherhood of Railway & Steamship Clerks*, 281 U. S. 548, 50 S. Ct. 427, and *Virginian Railway Co. v. System Federation No. 40*, 300 U. S. 515, 57 S. Ct. 592, clearly hold that the Railway Labor Act does not impose upon the carrier the obligation of compulsory arbitration, but that the

arbitration is voluntary, but the award is conclusive in the event arbitration is agreed upon.

A court of equity cannot impose a greater obligation as a prerequisite to injunctive relief than the law imposes. In instant case, the obligation is fixed by statute, which expressly provides that neither body shall be guilty of the violation of the Railway Labor Act, by its failure or refusal to submit a controversy to arbitration, and that such failure or refusal *shall not be construed as a violation of any legal obligation imposed upon it by the Railway Labor Act, or any other statute* (Sec. 157 of Title 45, U.S.C.A.).

The Circuit Court of Appeals of the Fifth Circuit in *Mayo v. Dean*, 82 F. (2d) 554-556 (1936) passed squarely upon the question raised in instant case as to whether injunctive relief should be granted to a plaintiff in an equity case, in view of the provisions of Section 8 (Sec. 108, Title 29 U.S.C.A.) of the Norris-LaGuardia Act, where mediation was the means adopted and pursued to a conclusion without arbitration, and the court in passing upon that question there said:

“Conceding, without so deciding, that the act applies, we consider it was fully complied with by complainant by availing himself of the services of the mediator of the Department of Labor. *He was not obliged to propose both mediation and arbitration. One or the other would be sufficient.*” (Italics ours.)

Respondent also urges that where violence and threats of violence are committed by employees, Section 8 (Sec. 108, Title 29 U.S.C.A.) of the Norris-LaGuardia Act has no application. (*Cater Construction Co. v. Nischwitz*, 111 F. (2d) 971 (C.C.A. 7); *United Electric Coal Co. v. Rice*, 80 F. (2d) 1 (C.C.A. 7); *Newton v. Laclede Steel Co.*, 80 F. (2d) 636 (C.C.A. 7), and this holding was adhered to in instant case by the Circuit Court of Appeals (R. 1030).

The Seventh Circuit Court of Appeals in *United Electric Coal Co. v. Rice, et al.*, 80 F. (2d) 1, held that the Norris-LaGuardia Act (29 U.S.C.A. 108) limiting the power of a federal court of equity to grant injunctions in labor dispute cases, does not prevent the court from protecting property from wilful destruction. Certiorari was denied by this court in that case. (*Rice v. United Electric Coal Co.*, 297 U. S. 714, 56 S. Ct. 590.)

CONCLUSION.

Respondent respectfully submits that the granting of a temporary injunction is within the sound discretion of the trial court. (*City of Reno v. Sierra Pac. Power Co.* (C.C.A. 9th) 44 F. (2d) 281; *Petroleum Exportation v. Public Service Commission*, 304 U. S. 200 at 218, 58 S. Ct. 834 at 839.)

The evidence in instant case shows that respondent sustained the complaint by an overwhelming preponderance of the evidence, and that the decree of the District Court and the judgment of the Circuit Court of Appeals should be affirmed.

Wherefore, respondent respectfully prays that the decrees of the District Court and the Circuit Court of Appeals be affirmed.

JOHN M. ELLIOTT,

CLARENCE W. HEYL,

Attorneys for Respondent.